

BRIEF FOR RESPONDENTS

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 07-1356

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NATIONAL CABLE & TELECOMMUNICATIONS  
ASSOCIATION

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND THE UNITED STATES OF AMERICA

Respondents.

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ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION

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## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

### ***A. Parties:***

All parties, intervenors, and amici appearing below and in this Court are listed in the Brief of Petitioner National Cable & Telecommunications Association.

### ***B. Rulings Under Appeal:***

*In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment*, Report and Order and Declaratory Ruling, 22 FCC Rcd 10640 (2007) (J.A. \_\_)

### ***C. Related Cases:***

A previous order of the Commission was reviewed by this Court in *National Cable & Telecommunications Association v. FCC*, No. 03-1140 (D.C. Cir. Feb. 17, 2004) (unpublished decision). The Court granted the petition for review and remanded the case to the Commission for further consideration; the order on review is the result of that remand. Counsel are not aware of any other related cases before this or any other court.

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## GLOSSARY

<i>First Report</i>	<i>In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Cable Home Wiring</i> , First Report and Order, 8 FCC Rcd 1435 (1993)
IMCC	Independent Multi-Family Communications Council
NCTA	Petitioner, National Cable & Telecommunications Association
RAA & CAI	Real Access Alliance and the Community Association Institute
RCN	RCN-BecoCom, L.L.C.
<i>Reconsideration Order</i>	<i>In the Matter of Telecommunications Services Inside Wiring</i> , First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003) (J.A. __)
<i>Remand Order</i>	<i>In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment</i> , Report and Order and Declaratory Ruling, 22 FCC Rcd 10640 (2007) (J.A. __)
<i>Report and Order</i>	<i>In the Matter of Telecommunications Services Inside Wiring</i> , Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997)

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BRIEF FOR RESPONDENTS

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**ISSUE PRESENTED**

Whether the Federal Communications Commission reasonably concluded that cable wiring behind sheet rock is “physically inaccessible” within the meaning of its cable inside wiring rules?

**STATUTES AND REGULATIONS**

Pertinent statutory provisions and regulations are set forth in the addendum to this brief.



## COUNTERSTATEMENT

### I. REGULATORY AND PROCEDURAL BACKGROUND

#### A. Implementation of the Cable Television Consumer Protection Act of 1992.

This case arises from the ongoing efforts by Congress and the Federal Communications Commission to extend the full benefits of video competition to the residents of apartment houses, condominiums, and cooperatives (collectively called multiple dwelling units or “MDUs”). In particular, the order on review governs what happens to the cable wiring used to serve an MDU resident when he or she switches to a competing video service provider.

As part of the Cable Television Consumer Protection Act of 1992, Congress directed the Commission to “prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.” 47 U.S.C. § 544(i) [known as Section 624(i) for its placement in the Communications Act]. At that time, incumbent cable operators sometimes insisted on removing their wiring when a customer chose to switch to a competitor, “thereby increasing the cost and inconvenience to the subscriber of having new wiring installed.”<sup>1</sup> Congress’s goal in enacting Section 624(i) was “to avoid the disruption of having the wiring removed and to allow subscribers to utilize the wiring with an alternative multichannel video delivery system.”<sup>2</sup>

In MDUs, multichannel video programming is typically provided through a common feeder line or riser cable that runs vertically in a multi-story building (e.g., up a stairwell) and

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<sup>1</sup> *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Cable Home Wiring*, First Report and Order, 8 FCC Rcd 1435, 1435, ¶ 2 (1993) (“*First Report*”) (citing H.R. Rep. No. 628, 102d Cong. 2d Sess. at 118 (1992) (“House Report”) & Senate Rep. No. 92, 102d Cong. 1st Sess at 23 (1991)).

<sup>2</sup> *Id.*, 8 FCC Rcd at 1435, ¶ 3 (citing House Report at 118).

serves as the source of video programming signals for the entire MDU.<sup>3</sup> In turn, each cable subscriber in an MDU has a dedicated line that runs to the subscriber's premises.

Acting pursuant to the directive found in Section 624(i), the Commission adopted rules requiring that "cable home wiring" be available for use by a successor multichannel video programming distributor ("MVPD") when a customer decided to switch service providers.<sup>4</sup> The rules defined "cable home wiring" as the "internal wiring contained within the premises of a subscriber which begins at the demarcation point." The rules in turn defined the "demarcation point" as "a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit." 47 C.F.R. § 76.5(l) & (m) (1994). The Commission noted in many cases, the subscriber already owned the cable home wiring, because either the subscriber had paid for it, the cable operator treated it as belonging to the subscriber for tax purposes, or state law treated it as a "fixture."<sup>5</sup> Under those circumstances, the Commission concluded that "the subscriber already has the right to use the cable with an alternative provider without further compensation and may not be prevented from doing so by the cable operator."<sup>6</sup>

In other situations where the cable operator owns the wiring, the Commission concluded that the operator faced with a subscriber canceling service could either abandon the wire –

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<sup>3</sup> *In the Matter of Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1344 ¶ 2 n.5 (2003) ("*Reconsideration Order*") (J.A. \_\_\_\_).

<sup>4</sup> MVPD refers to "a person such as, but not limited to, a cable operator, a multichannel distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13).

<sup>5</sup> *First Report*, 8 FCC Rcd at 1437, ¶ 15.

<sup>6</sup> *Id.*

leaving it “available for alternative uses by the former subscriber or new resident” – or give the canceling subscriber the option of purchasing it at “replacement cost.” Only if the subscriber declined to purchase the wire could the cable operator remove it.<sup>7</sup> The Commission used replacement cost, rather than a higher charge that would include reimbursement for the labor used to install the wire, because it concluded that cable operators had no “reasonable expectation that compensation would be received for [labor costs] above and beyond any installation charge that has already been levied.”<sup>8</sup>

#### **B. 1997 Change To The Definition Of Cable Home Wiring.**

In 1997, the Commission undertook a revision of both its cable and telephone inside wiring rules “in light of the evolving telecommunications marketplace.”<sup>9</sup> It concluded that “more [was] needed to foster the ability of subscribers who live in MDUs to choose among competing service providers.”<sup>10</sup> In particular, it identified as a serious “competitive problem[]” the obstacles that new video providers faced in gaining access to MDUs in order to install wires to reach potential customers’ units.<sup>11</sup> The Commission found that “MDU property owners often object to the installation of multiple home run wires in the hallways of their properties, for reasons including aesthetics, space limitations, the avoidance of disruption and inconvenience,

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<sup>7</sup> *First Report*, 8 FCC Rcd at 1438, ¶ 17.

<sup>8</sup> *Id.*, ¶ 18.

<sup>9</sup> *In the Matter of Telecommunications Services Inside Wiring Services*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3661 ¶ 1 (1997) (“*Report and Order*”).

<sup>10</sup> *Id.* at 3678, ¶ 35.

<sup>11</sup> *Id.*

and the potential for property damage.”<sup>12</sup> This resistance, the Commission concluded, “may deny MDU residents the ability to choose among competing service providers, thereby contravening the purposes of the Communications Act, and particularly Section 624(i), which was intended to promote consumer choice and competition.”<sup>13</sup>

Competitive cable providers in particular advised the Commission that its rule always placing the “demarcation point” for cable home wiring no more than 12 inches outside an MDU resident’s unit had turned out to be “anticompetitive.”<sup>14</sup> They demonstrated that “as a physical matter, the cable wiring at the demarcation point is often embedded in brick, plaster, or cinder blocks,” rendering it physically inaccessible.<sup>15</sup> Moreover, they said that a majority of MDU owners simply refused to permit additional wiring, instead “insist[ing] that a competitor to the incumbent cable operator may only provide service to the consumers residing in the MDU if the competitor uses the existing wiring within the building.”<sup>16</sup>

In light of these concerns, the Commission amended Section 76.5(mm) to provide that the demarcation point could be either twelve inches outside the subscriber’s dwelling unit, “or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber’s dwelling unit.” 47 C.F.R. § 76.5(mm)(2); *see also* 47 C.F.R. § 76.5 (mm)(3). The Commission also defined the term “physically inaccessible” as “a location that: (i) [w]ould require significant modification of, or significant

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<sup>12</sup> *Report and Order*, 13 FCC Rcd at 3678, ¶ 35.

<sup>13</sup> *Id.*, ¶ 36.

<sup>14</sup> *Id.* at 3721, ¶ 133.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

damage to, preexisting structural elements, and (ii) [w]ould add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring." 47 C.F.R. § 76.5(mm)(4). Finally, the Commission appended a Note to Section 76.5(mm)(4), which provided: "For example, wiring embedded in brick, metal conduit or cinder blocks with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not." 47 C.F.R. § 76.5(mm)(4) Note (1998).

Neither petitioner National Cable & Telecommunications Association ("NCTA") nor any other party sought judicial review of the Commission's 1997 changes to Section 76.5(mm).<sup>17</sup> In 1998, however, RCN-BecoCom, L.L.C. ("RCN"), an alternative cable provider, requested a letter ruling from the Commission that "cable wiring behind sheet rock is 'physically inaccessible,' such that the demarcation point should be located not at the twelve-inch mark, but rather at the operator's junction box."<sup>18</sup> The Commission addressed RCN's request in the *Reconsideration Order*, released in 2003, and concluded there that cable wiring behind sheet rock (also known as dry wall or plasterboard)<sup>19</sup> should be viewed, like cable wiring embedded in brick or cinder blocks, as "likely [to] be physically inaccessible," Note to 47 C.F.R. § 76.5(mm)(4).<sup>20</sup> As such, the Commission amended the Note after Section 76.5(mm) in order to list sheet rock as an example of a location in which embedded cable wiring likely would be

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<sup>17</sup> See *Reconsideration Order*, 18 FCC Rcd at 1362 ¶ 51 (J.A. \_\_\_\_).

<sup>18</sup> *Id.* (J.A. \_\_\_\_). The junction box contains the existing link between the subscriber and the incumbent provider and is often located on the subscriber's floor in larger MDUs or in the basement in smaller ones.

<sup>19</sup> Sheet rock is a board that consists of layers of fiberboard or paper bonded to a gypsum plaster core that is used to form walls and ceilings within building structures.

<sup>20</sup> *Id.*, ¶¶ 52 and 53 (J.A. \_\_\_\_).

physically inaccessible within the meaning of the rule: “For example, wiring embedded in brick, metal conduit, cinder blocks, *or sheet rock* with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not.” 47 C.F.R. § 76.5(mm)(4) Note (2004) (emphasis added).

NCTA petitioned the Court to review the portion of the *Reconsideration Order* that added sheet rock to the Note. In a brief unpublished order, the Court held that the *Reconsideration Order* “merely states unsupported conclusions” and “offers no reasoned basis for the amended Note to § 76.5(mm)(4).” *National Cable & Telecommunications Association v. FCC*, 89 Fed. Appx. 743, 745 (2004) (“*NCTA*”). In particular, the Court faulted the Commission for not explaining “why or how accessing wiring behind sheet rock requires ‘significant modification of, or significant damage to’ the sheet rock” and for not offering any “support” for its conclusion that cutting through sheet rock created “significant” physical difficulty and cost. *Id.* at 744-45. The Court thus granted the petition for review and remanded the case to the Commission “for further consideration.” *Id.* at 745.

## II. THE ORDER ON REVIEW

Just as it had done in 1998, the Commission in 2007 issued an order seeking to address the competitive difficulties new entrants to both the telephone and video markets face when attempting to compete against entrenched incumbents in MDUs. *In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment*, Report and Order and Declaratory Ruling, 22 FCC Rcd 10640 ¶ 1 (2007) (J.A.\_\_\_\_) (“*Remand Order*”). The Commission found that the steps it was taking would “remove both economic and operational barriers to infrastructure investment in the communications market” by changing “inefficient

industry practices” that had “foreclosed” “[n]ew entrants to the video services and telephony markets . . . from competing for consumers in multi-unit buildings.” *Id.* at 10641, ¶ 3 (J.A. \_\_\_\_).

#### **A. Cable Inside Wiring**

In response to the *NCTA* decision, the Commission had previously issued a Further Notice of Proposed Rulemaking seeking “comment as to whether our conclusions in general as stated in the *Reconsideration Order* with regard to Section 76.5(mm)(4) of the rules and the applicable Note are correct.”<sup>21</sup> In response, the Commission received a variety of submissions from NCTA, competitive video providers, and other parties.

In light of these submissions, the Commission concluded that cable wiring behind sheet rock would likely be “physically inaccessible,” defined in the Commission’s rules to describe a location that “(i) [w]ould require significant modification of, or significant damage to, preexisting structural elements, and (ii) [w]ould add significantly to the physical difficulty and/or cost of accessing the subscriber’s home wiring.”<sup>22</sup> In contrast to 2003, the Commission this time provided an extended analysis of each part of this definition.

##### **(1) “Preexisting Structural Element.”**

First, the Commission found that “sheet rock is a preexisting structural element.” *Remand Order* ¶¶ 19-22 (J.A. \_\_\_\_). The Commission noted comments establishing that “sheet rock is . . . an integral and permanent part of the building structure of MDUs.” *Id.* ¶ 19 (J.A. \_\_\_\_). Indeed, “sheet rock is installed as part of the construction of the building and it is integral to the overall structure: without sheet rock, some other material – such as brick or cinder block –

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<sup>21</sup> *In the Matter of: Telecommunications Services Inside Wiring*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 1233, 1236 ¶ 8 (2004) (J.A. \_\_\_\_).

<sup>22</sup> 47 C.F.R. § 76.5(mm)(4).

would have to be used to form walls and other building elements.” *Remand Order* ¶ 19 (J.A. \_\_). Moreover, commenters showed that “sheet rock is permanently fixed to the framing structure of the building and is not readily removed or designed to be removed.” *Id.* (J.A. \_\_).

Relying on these comments, the Commission concluded that sheet rock is clearly a “preexisting structural element” as that term is used in Section 76.5(mm)(4). It is “not merely a surface finish or decorative finish like molding” that is “added after a building is completed,” but is “a fundamental component of the construction of the building.” *Id.* ¶ 22 (J.A. \_\_).

Elaborating on the conclusion it reached in the *Reconsideration Order*, the Commission explained that “sheet rock is more like ‘brick or cinder block’ because it is commonly used to form ceilings and walls in MDUs.” *Id.* (J.A. \_\_). Because “ceilings and walls are an integral and permanent part of the building structure of MDUs,” the Commission reasoned that “sheet rock used to form ceilings and walls qualifies as a preexisting structural element for the purposes of the Commission’s rules.” *Id.* ¶ 22 (J.A. \_\_).

## (2) “Significant” Modification or Damage.

Second, having determined that sheet rock is a “preexisting structural element,” the Commission next found that accessing cable wiring behind sheet rock typically requires “significant” modification or damage. *Id.* ¶¶ 23-35 (J.A. \_\_). The Commission noted the comments of RCN, a competitive cable provider whose experience demonstrated that “cutting through sheet rock involves careful, difficult, and labor-intensive work.” *Id.* ¶ 24 (J.A. \_\_). As RCN described the process, “it must cut a hole that is at least 12 [inches] by 12 [inches],” using “a knife or similar tool” that “results in the creation of considerable dust and debris,” while at the same time taking care “to avoid damage to elements behind sheet rock, such as electrical wiring, insulation, duct work and plumbing.” *Id.* (J.A. \_\_). RCN also stated that the cutting “process



results in permanent damage to MDU walls or ceilings and the holes that remain must be repaired.” *Remand Order* ¶ 24 (J.A. \_\_\_\_). The repair effort, in turn, requires cutting another piece of sheet rock to “plug” the hole created and then it “must be spackled, taped and sanded and the area around the hole must later be repainted or re-wallpapered to the satisfaction of MDU managers and owners.” Moreover, “the whole wall or ceiling may need to be repainted or re-wallpapered in order to restore a uniform appearance.” *Id.* ¶ 24 (J.A. \_\_\_\_).

Commenters also discussed the “aesthetic considerations” involved in cutting through sheet rock. *Id.* ¶ 25 (J.A. \_\_\_\_). For instance, the Independent Multifamily Communications Council (“IMCC”) stated that “each penetration or hole in the wall or ceiling must be patched twice, sanded twice, primed and painted to match the prior paint,” and that “part of the job in many ‘upscale’ properties involves entire hallways being repainted or re-wallpapered.” *Id.* (J.A. \_\_\_\_). Similarly, the Real Access Alliance and the Community Association Institute (jointly “RAA & CAI”) stated that, because “property owners are concerned with the appearance of their buildings,” “any work involving cutting into sheet rock requires meticulous restoration,” and noted that “restoring the smoothness and texture of a wall and matching paint and wallpaper are difficult tasks.” *Id.* and n.81 (J.A. \_\_\_\_). They further noted that the necessary repair work “is no small task because obtaining access to wiring behind sheet rock requires the removal of sizable pieces of sheet rock, not only at the demarcation point, but at times at other places along the corridor or inside different units.” *Id.* (J.A. \_\_\_\_).

The Commission also took note of evidence that there were significant “safety issues” presented by cutting through sheet rock. *Id.* ¶ 26. RAA & CAI commented that “any action that affects the structural integrity of a building is considered significant by property owners.” *Id.* (J.A. \_\_\_\_). As RAA & CAI explained, cutting into certain types of sheet rock “may result in

degradation of a building's resistance to moisture, or its sound or insulating capability, as well as its resistance to fire.” *Remand Order* ¶ 26 (J.A. \_\_\_\_). For instance, any gaps or holes in a firewall can allow heat and flame to penetrate the firewall such that “any penetrations must be repaired carefully to restore the fire rating of the breached element of the structure.” *Id.* n.86 (J.A. \_\_\_\_). RAA & CAI also pointed out that under the National Electric Code, which is promulgated by the National Fire Protection Association, “wiring behind sheet rock is not considered accessible because it cannot be removed or exposed without causing damage to the structure or finish of the building.” *Id.* ¶ 27 and n.90 (J.A. \_\_\_\_).

At the same time, the Commission noted that NCTA offered evidence “to support its position that cable wiring behind sheet rock can be readily accessed without incurring damage to structural elements.” *Id.* ¶ 29 (J.A. \_\_\_\_); *see also* ¶ 28 (J.A. \_\_\_\_). Accordingly, the Commission found itself “faced with two substantially different points of view on whether significant modification or damage to preexisting structural elements occurs when efforts are made to access cable wiring behind sheet rock.” *Id.* ¶ 30 (J.A. \_\_\_\_).

In light of its careful assessment of both sets of evidence, the Commission concluded that “the record supports the conclusion that accessing inside wiring behind sheet rock causes significant modification and damage to structural elements, i.e., walls and ceilings, albeit modification and damage that may be repairable.” *Id.* (J.A. \_\_\_\_). The Commission explained that MDU property owners and managers “are not only concerned with the condition of individually-owned units or apartments, but also with the condition of the common elements in these structures,” which unlike single family residences, have common wall and ceilings that are shared by MDU residents. *Id.* ¶ 31 (J.A. \_\_\_\_). The Commission also noted that the record revealed that MDU property owners and managers “will sometimes require an entire wall or

ceiling be repainted or re-wallpapered even where the hole cut in the sheet rock is significantly smaller than the wall or ceiling in order to restore the area to its original appearance.” *Remand Order* ¶ 31(J.A. \_\_\_\_). “Requiring such extensive repair,” the Commission said, “is a strong indication that there has been significant modification or damage to a pre-existing structural area.” *Id.* ¶ 31 (J.A. \_\_\_\_). Also, with respect to issues of fire safety and possible degradation of the building’s resistance to moisture, the Commission decided to “take a conservative approach and give credence to the commenters who argue that cutting into sheet rock may pose a safety risk or affect a building’s resistance to moisture.” *Id.* (J.A. \_\_\_\_). While the “modification and damage may be repairable,” the Commission concluded that it is the “penetration of sheet rock for the purposes of accessing inside wiring,” which “constitutes significant modification and damage to structural elements [i.e., walls and ceilings] under the Commission’s rules.” *Id.* (J.A. \_\_\_\_).

The Commission found that its finding of “significant modification and damage” was reinforced by the “refusal of MDU owners to permit competitive providers to cut into sheet rock walls.” *Id.* ¶ 32 (J.A. \_\_\_\_). The Commission noted that its definition of “physical inaccessibility” did “not specifically take into account the willingness of MDU owners and managers to allow new service providers to cut and repair sheet rock.” *Id.* ¶ 35 (J.A. \_\_\_\_). Instead, the Commission concluded that such widespread refusal served as additional evidence in support of “the proposition that accessing wiring behind sheet rock exposes the walls to significant modification or damage” because it “suggests that the consequences of doing so are significant to the building owners.” *Id.* ¶ 35 (J.A. \_\_\_\_). For instance, the Commission noted RCN’s comments that based on its own past experience, “MDU owners and managers will not allow RCN to cut, open, plug, spackle, tape, sand and paint ceilings and walls in order to install new lines because it is

disruptive and could eventually require the replacement of entire ceilings and walls.” *Id.* ¶ 33 (J.A. \_\_\_\_). RCN thus argued that “if an MDU owner prohibits a competitive provider from cutting holes in a building’s walls and ceilings in order to access the home run wiring then it is physically impossible to access these lines.” *Remand Order* ¶ 33 (J.A. \_\_\_\_). Other commenters agreed that competition to provide cable services to subscribers living in MDUs was inhibited due to “the resistance of MDU owners and residents to physical degradation of their property and the associated inconvenience and cost . . . and [thus] the incumbent cable provider remains entrenched.” *Id.* (J.A. \_\_\_\_).

### (3) Physical Difficulty and Cost.

Third, the Commission found that “accessing the demarcation point behind sheet rock adds significantly to the physical difficulty and/or cost of accessing the subscriber’s home wiring.” *Id.* ¶¶ 36-47. (J.A. \_\_\_\_). As an initial matter, the Commission noted that this portion of its rule used the disjunctive, so it was not necessary for it to find that accessing a demarcation point behind sheet rock would present *both* a “significant physical difficulty” *and* a significant additional cost. *Remand Order* ¶ 40 (J.A. \_\_\_\_). The Commission concluded, however, that in this case both prongs of the definition were met.

As the Commission explained, “[a]ccessing such wiring requires some level of physical harm to the property – i.e., access holes cut in the sheet rock – and that the property be restored to its original integrity and appearance.” *Id.* ¶ 40 (J.A. \_\_\_\_). Adding to the physical difficulty was the fact that the “repair is not always limited to the hole(s) cut; it can include repainting

and/or re-wallpapering necessary to restore the premises.” *Remand Order* ¶ 40 (J.A. \_\_\_\_).<sup>23</sup> Thus, the Commission found that the necessity of cutting through and restoring the sheet rock “adds significantly to the physical difficulty involved in accessing the wiring, certainly as compared to accessing wiring behind hallway molding (the example in the Commission’s rules of wiring that is not physically inaccessible).” *Id.* (J.A. \_\_\_\_).<sup>24</sup>

The Commission also concluded “that the cost of accessing wiring behind sheet rock is significant.” *Id.* ¶ 41 (J.A. \_\_\_\_). Competitive cable providers submitted specific cost information documenting how expensive accessing wiring behind sheet rock can be. *Id.* (J.A. \_\_\_\_). For instance, IMCC submitted letters from two private cable operators. One of them stated that the work involved in accessing wiring at the demarcation point behind sheet rock “takes between two to four hours per unit and one hole cut would add \$150.00 to \$250 to the cost of wiring a unit.” The cable operator further noted that “in a typical 200-unit building this work would cost approximately \$40,000.00.” *Id.* (J.A. \_\_\_\_). The other cable operator stated that where the traditional twelve-inch demarcation point outside of one dwelling unit is “12 inches inside the neighboring MDU residence,” it is “necessary to install a completely separate home run wire

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<sup>23</sup> The Commission found that, as described by commenters, the process of accessing cable wiring located behind sheet rock “involves more than simply cutting through the material.” *Remand Order* ¶ 38 (J.A. \_\_\_\_). For example, RCN explained that once it has cut a hole in the sheet rock (with no guarantee that it will actually be able to locate and retrieve the wiring where it first cuts the hole), it must then connect its own subscriber line to the existing subscriber line at the demarcation point, and thereafter run its own subscriber line back to the junction box to its network interface. RCN stated that this process is particularly difficult to undertake in MDUs where it “faces unknown obstacles such as heating ducts, water pipes, and other facilities,” which may require it “to cut additional holes in the sheet rock to avoid them.” *Id.* (J.A. \_\_\_\_).

<sup>24</sup> In comparison to sheet rock, the process of accessing cable wiring behind hallway molding was described “as a simple process that generally only requires snapping the molding off its retainer in order to access the embedded wiring and snapping it back on once work is completed.” *Id.* ¶ 47 (J.A. \_\_\_\_).

from the junction box to an access point within the residence at a cost of a minimum of \$200.00 per unit.” *Remand Order* ¶ 41 (J.A. \_\_\_\_). In addition, Verizon stated that “restoration of sheet rock is the most labor-intensive and expensive part of the whole process because it requires multiple visits” to allow time “for the repair work to set and dry before additional steps can be taken in the restoration process.” *Id.* ¶ 41 (J.A. \_\_\_\_). Verizon estimated that restoring sheet rock to an acceptable condition “may vary from \$200.00 for an uncomplicated situation to \$1,000.00 or more for high-end MDUs or in instances where larger sections of sheet rock must be repainted or wallpapered.” *Id.* (J.A. \_\_\_\_).

At the same time, the Commission noted that NCTA submitted evidence that it believed showed that “there are no significant costs involved in cutting and repairing sheet rock.” *Id.* ¶ 43 (J.A. \_\_\_\_) (summarizing NCTA’s comments); *see also id.* ¶ 45 (J.A. \_\_\_\_). The Commission therefore again found itself faced with contradictory evidence, as “the record reveals a wide divergence among the estimates offered by commenters – ranging from \$25.00 to \$1,000.00 – as the appropriate sum needed to accomplish the job.” *Id.* ¶ 46 (J.A. \_\_\_\_). The Commission acknowledged that it could not “pick a precise monetary figure that fairly reflects the costs associated with accessing cable inside wiring,” but it was able to reject NCTA’s \$25 dollar estimate as much too low. *Id.* That number failed to take account of elements the Commission concluded were part of the cost of accessing wire behind sheet rock, particularly the repainting and re-wallpapering of entire walls or ceilings that many MDU owners demanded. *Id.* Those costs would, “at a minimum, run into the hundreds of dollars, particularly for more high-end MDUs that use more expensive surface finishes.” *Id.* The Commission concluded that such costs were “significant, especially when compared to the estimates [it] received for accessing wiring behind hallway molding.” *Id.*

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Given its consideration of each element of the definition of “physically inaccessible” in its inside wiring rules, the Commission amended the Note to include it in the list of materials “likely” to meet the test of physical inaccessibility for purposes of determining the demarcation point where cable home wiring begins. *Remand Order* ¶ 56 (J.A. ).

#### **B. Telephone Inside Wiring.**

As part of the same order, the Commission granted a petition by NCTA member Cox Communications asking that the Commission clarify its rules regarding competitive telephone carriers’ rights to access incumbent phone companies’ wiring inside MDUs. *Remand Order* ¶¶ 48-55 (J.A. \_\_\_\_). Cox, through a subsidiary, is competing with AT&T (known as Southwestern Bell at the time Cox filed its request) for telephone customers in Oklahoma. *Id.* ¶ 7 (J.A. \_\_\_\_). Cox argued that AT&T was unreasonably denying it access to AT&T’s wiring inside MDUs and that this was resulting in AT&T’s “maintain[ing] the enormous competitive advantage inherent in operating legacy facilities” to the detriment of meaningful telecommunications competition. *Id.* ¶ 8 (J.A. \_\_\_\_). In granting Cox’s petition, the Commission clarified that its rules governing telephone “subloops” in MDUs required that competitors be given “direct access” and that anything short of that would “be contrary to the Commission’s rules and policy of promoting telephone and broadband competition.” *Id.* ¶ 48 (J.A. \_\_\_\_). No party has challenged that portion of the order.

#### **SUMMARY OF ARGUMENT**

The Commission reasonably concluded that cable wiring behind sheet rock is likely “physically inaccessible” within the meaning of its cable home wiring rules. In reaching this conclusion, the Commission was interpreting its own regulations (entitling it to the highest level

of judicial deference) and weighing conflicting record evidence (an exercise this Court does not second-guess). The Commission's rules classify as "physically inaccessible" wiring found in a location where access would require significant modification or damage to a structural element and where access would be physically difficult or costly. In this case, the Commission reasonably determined that each element of this definition was satisfied. Sheet rock, which forms walls and ceilings, is a structural element, and accessing wiring behind it requires that it be significantly modified. Not only is cutting required, but so is extensive repair work, often including repainting and wallpapering large surface areas. For many of the same reasons, the Commission found that such access is physically difficult and costly.

All of NCTA's specific challenges to the Commission's findings are meritless. Although NCTA appears to suggest that the Commission erred by placing the "demarcation point" outside the individual units of MDU residents, the Commission made that determination in 1993 and 1997 (not in the order on review), and NCTA cannot challenge it now. NCTA also suggests that the Commission should have left the determination of the physical inaccessibility of wiring behind sheet rock to case-by-case determination, but it was permissible for the Commission to adopt a presumptive rule of general applicability so that incumbent operators and new entrants would have a clear understanding of their rights and obligations. NCTA argues that the Commission erred by relying on the evidence submitted by competitive cable operators rather than NCTA's own submissions. In each case, however, the agency explained its reasons for doing so, and this Court is not in the business of refereeing such evidentiary disputes. Finally, NCTA contends that the order was the improper product of the Commission's policy preferences, but the Commission had ample record support for each of its conclusions and in any event is permitted to effectuate the broader purposes of its regulations when interpreting them.



## ARGUMENT

### I. STANDARD OF REVIEW

The Court must deny the petition for review unless NCTA demonstrates that the challenged agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>25</sup> “Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action.”<sup>26</sup> To prevail, the Commission need only articulate a “rational connection between the facts found and the choice made.”<sup>27</sup>

Moreover, the Court affords substantial deference to the Commission’s interpretation of its own rules and policies, and “will uphold the FCC’s interpretation unless it is ‘plainly erroneous or inconsistent with the regulation.’”<sup>28</sup>

### II. THE COMMISSION REASONABLY INTERPRETED ITS RULES WHEN IT CONCLUDED THAT CABLE WIRING BEHIND SHEET ROCK IS LIKELY “PHYSICALLY INACCESSIBLE.”

Since 1997, the Commission’s rules governing the “demarcation point” where cable home wiring begins (and where competitors can gain access efficiently and without unnecessary disruption to subscribers or building owners) have been unchanged. Those rules provide that the demarcation point is either “at (or about) twelve inches outside of where the cable wire enters the subscriber’s premises” or “where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber’s dwelling

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<sup>25</sup> 5 U.S.C. § 706(2)(A).

<sup>26</sup> *LaRouche’s Committee for a New Bretton Woods v. FCC*, 439 F.3d 733, 737 (D.C. Cir. 2006), quoting *Cellco Partnership v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004).

<sup>27</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>28</sup> *Damsky v. FCC*, 199 F.3d 527, 535 (D.C. Cir. 2000) (citation omitted).

unit.” 47 C.F.R. § 76.5(mm)(2). Since 1997, the rules have defined the term “physically inaccessible” as “a location that:”

- (i) Would require significant modification of, or significant damage to, preexisting structural elements, and
- (ii) Would add significantly to the physical difficulty and/or cost of accessing the subscriber’s home wiring.

47 C.F.R. § 76.5(mm)(4).

NCTA does not appear to challenge the validity of this rule, nor could it since any such challenge would be untimely. Instead, the only issue in this case is the addition of “sheet rock” to the Note following the rule, which now reads in its entirety: “For example, wiring embedded in brick, metal conduit, cinder blocks, or sheet rock with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not.” 47 C.F.R. § 76.5(mm)(4) (Note). The Commission was here interpreting one of its own regulations, and this Court extends maximum deference in such situations. *See Damsky*, 199 F.3d at 535. With or without this favorable standard of review, it is clear that the Commission reasonably interpreted the regulatory definition of “physically inaccessible” when it concluded that cable wiring behind sheet rock would “likely” qualify.

**A. The Commission Reasonably Found That Accessing Cable Wiring Embedded in Sheet Rock Would Cause Significant Damage to or Modification of a Preexisting Structural Element.**

In a conclusion that NCTA does not appear to dispute, the Commission found that sheet rock, which “is commonly used to form ceilings and walls in MDUs,” is a ‘preexisting structural element’ within the meaning of Section 76.5(mm)(4) of its rules, because sheet rock is “an integral and permanent part of the building,” and “a fundamental component of the construction

of the building.” *Remand Order* ¶ 22 (J.A. \_\_\_\_). This commonsensical conclusion was clearly reasonable.

As detailed previously, *see* Counterstatement Section II.A.2., the Commission next reasonably concluded that “penetration of sheet rock for purposes of accessing inside wiring constitutes significant modification and damage to” the shared walls and ceilings in MDUs and requires “extensive repair.” *Id.* ¶ 31 (J.A. \_\_\_\_). For instance, the record revealed that “restoring the smoothness and texture of a wall and matching paint and wallpaper are difficult tasks,” and that the repair work is not necessarily limited to the access hole cut in the sheet rock, but sometimes required that an entire wall or ceiling be re-painted or re-wallpapered to restore the area to its original appearance. *Id.* n. 86, ¶ 31 (J.A. \_\_\_\_). In addition, “cutting into sheet rock may pose a safety risk or affect a building’s resistance to moisture.” *Id.* (J.A. \_\_\_\_). For instance, with respect to firewalls, “any penetration must be repaired carefully to restore the fire rating of the breached element of the structure.” *Id.* ¶ 26 (J.A. \_\_\_\_). In reaching its conclusion, the Commission also found instructive that, under the National Electric Code, “wiring behind sheet rock is not considered accessible because it cannot be removed or exposed without causing damage to the structure or finish of the building.” *Id.* ¶ 27 (J.A. \_\_\_\_).

The Commission also rejected the assertion NCTA makes here that accessing cable wiring behind sheet rock is not “significantly different from those associated with accessing wiring behind molding.” NCTA Br. at 27. As the Commission explained, accessing wiring behind sheet rock is more like accessing wiring behind “brick or cinder block” because it is necessary to cut into the sheet rock and repair it once the wiring has been accessed. *See Remand Order on Review* ¶ 31 (J.A. \_\_\_\_). In contrast, accessing wiring behind molding does not require physical harm to the molding or repair work, but “generally only requires snapping the molding

off its retainer in order to access the embedded wiring and snapping it back on once the work is completed.” *Remand Order* ¶ 47. Thus, as compared with accessing wiring behind hallway molding – the example of a location that “likely” would *not* meet the Commission’s definition of “physically inaccessible” – the Commission reasonably concluded that accessing cable wiring behind sheet rock causes “significant” damage to or modification of a preexisting structural element.

**B. The Commission Reasonably Concluded that Accessing Wiring Behind Sheet Rock Would Add Significantly to the Physical Difficulty or Cost of Accessing the Subscriber’s Home Wiring.**

Similarly, the Commission reasonably concluded that cable wiring embedded in sheet rock would “significantly” add to both the physical difficulty and cost of accessing the subscriber’s home wiring within the meaning of its rule. *Remand Order* ¶ 47 (J.A. \_\_); *see* Counterstatement Section II.A.3. Since these requirements are disjunctive, the Commission could have based its conclusion that wiring behind sheet rock was physically inaccessible on a finding *either* that accessing it would present significant “physical difficulty” or cost. In this case, it made both findings.

As the Commission explained, accessing cable wiring behind sheet rock requires “physical harm to the property – i.e., access holes cut in the sheet rock – and that the property be restored to its original integrity and appearance.” *Id.* ¶ 40 (J.A. \_\_). Adding to the physical difficulty was the fact that the “repair is not always limited to the hole(s) cut; it can include repainting and/or re-wallpapering necessary to restore the premises” to the satisfaction of MDU property owners and managers. *Id.* (J.A. \_\_).

Accessing cable wiring at the traditional twelve-inch demarcation point is particularly difficult in MDUs. Unlike single family homes, subscribers in MDUs share common walls and ceilings. *Id.* ¶ 31 (J.A. \_\_\_\_). Thus, the traditional twelve-inch demarcation point may be located in a neighboring dwelling unit. *Id.* ¶ 41 (J.A. \_\_\_\_). Also, once the connection is made at the demarcation point, running the subscriber's line from the demarcation point to the junction box (often located in the basement of smaller MDUs or on the subscriber's floor in larger ones), may require the cutting of additional holes in sheet rock in order to avoid obstacles such as heating ducts, water pipes, or other facilities that are also located behind sheet rock. *Id.* ¶ 38 (J.A. \_\_\_\_).

The difficult physical process of accessing cable wiring behind sheet rock also adds significantly to the cost of accessing such wiring, particularly as compared to accessing cable wiring embedded in hallway molding, which generally does not require cutting through or repair of the molding. *See id.* ¶ 47 (J.A. \_\_\_\_). The record included a wide range of per-unit cost estimates (from \$25.00 to \$1000) for such work. *Id.* (J.A. \_\_\_\_). The Commission found it unnecessary to "pick a precise monetary figure" within the range because it was clear that the estimates at its lower end were seriously incomplete. *Id.* (J.A. \_\_\_\_). Those estimates did not take into account cost elements such as the repair and restoration work (including repainting and re-wallpapering) typically demanded by MDU owners and managers. *Id.* (J.A. \_\_\_\_); *see also id.* ¶ 26 (J.A. \_\_\_\_). Such real-world expenses are reasonably included in the cost of accessing wire behind sheet rock; indeed, to ignore them would dramatically understate the expense of the undertaking. And in light of those expenses, the Commission's conclusion "that the cost of accessing wiring behind sheet rock is significant" was clearly reasonable. *Id.* (J.A. \_\_\_\_).

### III. NCTA'S SPECIFIC CHALLENGES TO THE ORDER ARE MERITLESS.

NCTA's specific challenges to the order are based on misunderstandings of the regulatory scheme or improper invitations to the Court to reweigh the evidence the Commission already evaluated. All of its claims fail.

#### A. NCTA Advances Several Legally Erroneous Claims.

Although its position is not entirely clear, NCTA appears to argue that the Commission erred because Section 624(i) "reflects a Congressional determination that only wiring inside the actual dwelling unit . . . should be covered by the cable home wiring rules." NCTA Br. at 23; *see also id.* at 34. That claim is not properly part of this case. The Commission first placed the "demarcation point" for starting cable home wiring outside the customer's premises (by twelve inches) in 1993 and then extended it further in 1997 in cases where the twelve-inch demarcation point was "physically inaccessible." *See First Report*, 8 FCC Rcd at 1437, ¶ 12; *Report and Order*, 13 FCC Rcd at 3729, ¶ 150. NCTA did not challenge those determinations at the time they were made, and cannot do so now. *See National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1566 (D.C. Cir.), *cert. denied* 484 U.S. 869 (1987) ("The challenge to the [agency's] order several years after it became final and effective comes too late."); *see also id.* ("Congress may prescribe the procedures and conditions under which review of administrative orders may be had, and Congress has stated that all objections to a final Commission order must be made on direct review in the appellate court or not at all." (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958))).

NCTA offers a variation of this foreclosed argument when it contends that the Commission's conclusion is subject to a "high[] burden" because it represents an "*exception* to a general rule," i.e., that the cable home wiring rules be limited "to wiring *inside* residential units."

NCTA Br. at 24. This case, however, involves only a challenge to the Commission's interpretation of its own regulations, and those regulations establish no such "general rule." The Commission's rules provide that competing carriers may access existing cable home wiring at the "demarcation point," which is in turn defined as being a point twelve inches *outside* the customer's unit or even further when the twelve-inch mark is not physically accessible. *See* 47 C.F.R. § 76.5(*ll*) & (*mm*). Accordingly, the Commission's "general rule" is that cable home wiring extends beyond individual residential units in the MDU, and the Commission here simply interpreted that general rule (not any exception to it).

NCTA contends that "whether wiring behind a particular material is or is not accessible will depend on the circumstances" and that the Commission therefore erred by adopting a generally applicable rule. NCTA Br. at 23. Although its position is not entirely clear, NCTA appears to believe that the physical accessibility or inaccessibility of wiring behind sheet rock should be determined *de novo* on a hallway-by-hallway basis in the thousands upon thousands of MDUs in the United States. The Commission properly rejected such a chaotic approach, concluding instead that it was necessary to have clear guidance that would avoid confusion and speed competitive entry. *See Remand Order* ¶ 1. As discussed above, the Commission reasonably concluded that, as a general matter, cable wiring behind sheet rock was "physically inaccessible," and that conclusion was based on substantial evidence in the record. There was no requirement that the Commission find that this conclusion would apply in the particular circumstances of every single MDU. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 777 (1975) (discussing benefit of clear prophylactic rules and rejecting claim that such rules are invalid because of possible overbreadth). In any event, the Note at issue here states only that "wiring embedded in . . . sheet rock . . . would *likely* be physically inaccessible." 47 C.F.R.

§ 76.5(mm)(4) Note (emphasis added). It thus remains open to NCTA or individual cable operators to come to the Commission with particular cases or classes of cases in which they believe such wiring is in fact physically accessible.

**B. NCTA's Challenges To The Commission's Factual Findings Are Meritless.**

NCTA acknowledges at one point in its brief that “[w]here there is contradictory evidence in the record, courts do, of course, give considerable deference to an expert agency’s assessment and balancing of that evidence.” NCTA Br. at 27-28.<sup>29</sup> Yet despite this concession, it nonetheless asks this Court to reweigh the conflicting evidence submitted to the Commission by, for example, holding that the Commission erred by crediting evidence submitted by competing cable operators when the incumbents’ evidence came from installers “with over 80

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<sup>29</sup> NCTA is wrong when it suggests that the Commission’s weighing of the evidence is not entitled to deference because the Commission has no “internal technical expertise” for assessing the damage, cost, or difficulty of accessing inside wiring behind sheet rock. *See* NCTA Br. at 28. Congress delegated authority to the Commission to prescribe cable inside wiring rules, *see* 47 U.S.C. § 544(i), and thus the Commission is clearly the “expert” on construing the meaning of those rules. As this Court has explained, “[t]he substantive area in which an agency is deemed to be expert is determined by statute.” *Massachusetts v. NRC*, 924 F.2d 311, 324 (D.C. Cir. 1991) (rejecting party’s claim that NRC’s interpretation of one of its regulations was not entitled to deference because of NRC’s supposed “lack of expertise” over the subject matter, where regulation was issued pursuant to statutory authority). Here, Congress has by statute conferred authority over cable wiring on the Commission.



years of collective experience installing cable wire behind sheet rock,” NCTA Br. at 31.<sup>30</sup> The Commission candidly acknowledged throughout the *Remand Order* that the record contained conflicting evidence, and more importantly, carefully explained its reasons for weighing the evidence as it did. *See, e.g., Remand Order* ¶¶ 30, 46 (J.A. \_\_\_\_). The Commission need do no more for the Court to uphold its factual determinations. *See American Horse Protection Ass’n v. Yeutter*, 917 F.2d 594, 598 (D.C. Cir. 1990) (conflicting evidence in the record does not support “a *de novo* reweighing of the evidence . . . when reviewing agency action under an arbitrary and capricious test,” citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 37 (D.C. Cir. 1976) as “observing that records frequently contain evidence that can be isolated to support ‘virtually any inference that one might care to draw’” (further citation omitted)); *Houston Lighting & Power Co. v. U.S.*, 606 F.2d 1131, 1141 (D.C. Cir. 1979) (“it is not this court’s function to weigh again the evidence carefully considered by the [agency].”).

Also unfounded is NCTA’s contention that the Commission based its conclusions on its “counting [of] the number of parties aligned on each side of an issue.” *See* NCTA Br. at 29. NCTA appears to base this interpretation of the Commission’s analysis on the Commission’s

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<sup>30</sup> The Commission’s conclusions were supported by commenters’ firsthand experience accessing cable wiring behind sheet rock, as well as relevant commercial materials and guidelines from the National Fire Protection Association (“experts in the field of building safety”). *See, e.g., Remand Order* ¶ 24 (J.A. \_\_\_\_) (summarizing RCN’s description (supported by an affidavit from its ISP construction manager) of the company’s experience accessing cable wiring behind sheet rock); *id.* ¶ 26 n.86 (J.A. \_\_\_\_) (describing evidence related to sheet rock’s “resistance to moisture, or its sound or temperature insulating capacity, as well as its resistance to fire,” offered by declaration from companies that own and manage MDUs and from the website of commercial building materials supplier); *id.* ¶ 26 n.89 (J.A. \_\_\_\_) (citing declaration of Verizon’s executive director for network operations related to building codes); *id.* ¶ 27 (J.A. \_\_\_\_) (noting that the National Electric Code does not consider wiring behind sheet rock “accessible because it cannot be removed or exposed without causing damage to the structure or finish of the building”).

observation in several parts of the *Remand Order* that a “majority of commenters” supported a certain position. *See, e.g., Remand Order* ¶ 17. As noted previously, however, the Commission explained in painstaking detail why it credited certain evidence over other evidence. Each passage cited by NCTA, however, reflects only the Commission’s descriptive summary of the comments filed. *See* NCTA Br. at 29 n.41. All of those descriptions are followed by the Commission’s descriptive summary of opposing comments, followed by separate paragraphs where the Commission draws its own conclusions based on the record. The Commission’s own conclusions were based on its own analyses, not a tally of commenters.<sup>31</sup> So NCTA’s extended argument against the propriety of doing so is beside the point.

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<sup>31</sup> *Compare Remand Order* ¶ 17 (J.A.\_\_\_\_) (noting that a “majority of commenters . . . agree that cable inside wiring located behind sheet rock is physically inaccessible”) *with id.* ¶¶ 22, 31, 40, 46 (J.A.\_\_\_\_) (explaining why Commission found all elements of physical inaccessibility test were met). *Compare id.* ¶ 19 (J.A.\_\_\_\_) (noting that a “majority of commenters here assert that it is well-established that sheet rock is a preexisting structural element”) *with id.* ¶ 22 (J.A.\_\_\_\_) (Commission explains its reasons for reaching that conclusion).

*Compare id.* ¶ 23 (noting that a “majority of commenters agree that the modification of or damage done [when accessing cable behind sheet rock] is significant”) *and id.* ¶ 30 (J.A.\_\_\_\_) (noting that “[m]ost commenters” offered specific evidence of significance of modification and damage) *with id.* ¶ 31 (J.A.\_\_\_\_) (Commission explains its reasons for concluding that accessing cable behind sheet rock requires significant modification or damage).

*Compare id.* ¶ 32 (J.A.\_\_\_\_) (noting that “majority of commenters agree that competition from new service providers in MDUs is impeded because MDU owners and managers do not want new providers on the premises cutting and repairing sheet rock”) *with id.* ¶ 35 (J.A.\_\_\_\_) (explaining why Commission concluded such reluctance reinforced its finding that accessing wiring behind sheet rock causes significant modification or damage).

*Compare id.* ¶ 37 (J.A.\_\_\_\_) (noting that a “majority of commenters agree that accessing the demarcation point behind sheet rock adds significantly to the physical difficulty and cost of accessing the subscriber’s home wiring”) *and id.* ¶ 41 (J.A.\_\_\_\_) (noting that a “majority of commenters agree” that accessing wiring behind sheet rock causes “significant” costs) *with id.* ¶ 40 (J.A.\_\_\_\_) (explaining Commission’s reasons for finding that accessing wiring behind sheet rock is “physical[ly] difficult”) *and id.* ¶ 46 (explaining Commission’s reasons for finding that accessing wiring behind sheet rock causes “significant” costs to be incurred).

NCTA claims that the Commission erred by citing the reluctance of building owners to permit new entrants to access wiring behind sheet rock to support the agency's conclusion that such access causes significant damage or modification. NCTA Br. at 32-33. NCTA claims that such reluctance is based on "inconvenience, messiness and disruption," which it believes does not result from any significant modification or damage to walls and ceilings. NCTA Br. at 33. This contention is specious. The reason that cutting through sheet rock – and repairing and repainting or wallpapering afterwards – is inconvenient, messy, and disruptive is that it involves a significant modification to the affected surfaces. As RCN explained when discussing its own experience in MDUs, "MDU owners and managers will not allow RCN to cut, open, plug, spackle, tape, sand and paint ceilings and walls in order to install new lines because it is disruptive and could eventually require the replacement of entire ceilings and walls." *Remand Order* ¶ 33. In any event, the Commission cited the reluctance of MDU owners and managers as merely confirmatory evidence of the significant modifications required when accessing cable wiring found behind sheet rock. *See id.* ¶ 35 (reluctance by MDU owners and managers "supports the proposition that accessing wiring behind sheet rock exposes the walls to significant modification or damage," a "proposition" the Commission independently made in Paragraph 31). *See* 5 U.S.C. 706 (2)(F) (in judicial review of agency actions "due account shall be taken of the rule of prejudicial error").

Finally, NCTA contends that the Commission impermissibly based its findings on its policy favoring video competition in MDUs. NCTA Br. at 33-36. Contrary to NCTA's suggestion, the Commission did not simply impose its policy preference in this case. As discussed above, the Commission instead carefully parsed the specific terms of its own rules and provided ample record support for each of its conclusions. Moreover, when construing

ambiguous regulations an agency is clearly permitted to advance its view of the underlying regulatory purpose and of good policy. *See Minnesota Christian Broadcasters, Inc. v. FCC*, 411 F.3d 283, 286 (D.C. Cir. 2005) (where the Court upheld as reasonable the Commission’s reading of its own rule in a way to “better effectuate[] the policy” behind the rule); *Central Texas Tele. Co-op, Inc. v. FCC*, 402 F.3d 205, 212-13 (D.C. Cir. 2005) (“*Chevron* recognized that an agency’s choice among plausible meanings of a statute may be influenced by considerations of policy” and “[t]he Supreme Court has said much the same regarding an agency’s interpretation of its regulations,” *citing Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (further citation omitted)); *see also Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (“As *Chevron* itself illustrates, the resolution of ambiguity in a statutory text is often more a question of policy than law.”). In this case, the Commission properly took account of Congress’s and the Commission’s policy interest in extending the benefits of video competition to the residents of MDUs. In fact, the Commission cited the very same pro-competitive policy goals in the *Remand Order* when it construed its regulations to promote telecommunications competition in MDUs as requested by NCTA member Cox. *See, e.g., Remand Order* ¶ 1.

CONCLUSION

For these reasons, NCTA's petition for review of the *Remand Order* should be denied.

Respectfully submitted,

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April 14, 2008

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL CABLE & TELECOMMUNICATIONS Association )

PETITIONER, )

v. )

FEDERAL COMMUNICATIONS COMMISSION AND )  
THE UNITED STATES OF AMERICA )

RESPONDENTS. )

No. 07-1356

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 8854 words.



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April 14, 2008

# STATUTORY APPENDIX

47 U.S.C. § 544

47 C.F.R. § 76.5 (1994)

47 C.F.R. § 76.5 (1998)

47 C.F.R. § 76.5 (2004)

**UNITED STATES CODE ANNOTATED**  
**TITLE 47. TELEGRAPHS, TELEPHONES,**  
**AND RADIOTELEGRAPHS**  
**CHAPTER 5. WIRE OR RADIO COMMUNICATION**  
**SUBCHAPTER V - A. CABLE COMMUNICATIONS**  
**PART III. FRANCHISING AND REGULATION**

**§ 544. Regulation of services, facilities, and equipment**

(a) Regulation by franchising authority

Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system--

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h) of this section, establish requirements for video programming or other information services; and

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise--

(A) for facilities and equipment; and

(B) for broad categories of video programming or other services.

(c) Enforcement authority respecting franchises effective under prior law

In the case of any franchise in effect on the effective date of this subchapter, the franchising authority may, subject to section 545 of this title, enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

(d) Cable service unprotected by Constitution; blockage of premium channel upon request

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.



(2) In order to restrict the viewing of [FN1] programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

(3)(A) If a cable operator provides a premium channel without charge to cable subscribers who do not subscribe to such premium channel, the cable operator shall, not later than 30 days before such premium channel is provided without charge--

(i) notify all cable subscribers that the cable operator plans to provide a premium channel without charge;

(ii) notify all cable subscribers when the cable operator plans to offer a premium channel without charge;

(iii) notify all cable subscribers that they have a right to request that the channel carrying the premium channel be blocked; and

(iv) block the channel carrying the premium channel upon the request of a subscriber.

(B) For the purpose of this section, the term "premium channel" shall mean any pay service offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC-17, or R.

(e) Technical standards

Within one year after October 5, 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology. No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.

(2) Paragraph (1) shall not apply to--

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this subchapter; and

(B) any rule, regulation, or order under Title 17.

(g) Access to emergency information

Notwithstanding any such rule, regulation, or order, each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations in subpart G of part 73, title 47, Code of Federal Regulations.

(h) Notice of changes in and comments on services

A franchising authority may require a cable operator to do any one or more of the following:

- (1) Provide 30 days' advance written notice of any change in channel assignment or in the video programming service provided over any such channel.
- (2) Inform subscribers, via written notice, that comments on programming and channel position changes are being recorded by a designated office of the franchising authority.

(i) Disposition of cable upon termination of service

Within 120 days after October 5, 1992, the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.

[FN1] So in original.

47 C.F.R. s 76.5 (1994)

**CODE OF FEDERAL REGULATIONS**  
**TITLE 47--TELECOMMUNICATION**  
**CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION**  
**SUBCHAPTER C--BROADCAST RADIO SERVICES**  
**PART 76--CABLE TELEVISION SERVICE**  
**SUBPART A--GENERAL**

§ 76.5 Definitions.

(a) Cable system or cable television system. A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (1) a facility that services only to retransmit the television signals of one or more television broadcast stations; (2) a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way; (3) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers; or (4) any facilities of any electric utility used solely for operating its electric utility systems.

Note: The provisions of Subparts D and F of this Part shall also apply to all facilities defined previously as cable systems on or before April 28, 1985.

(b) Television station; television broadcast station. Any television broadcast station operating on a channel regularly assigned to its community by s 73.606 of this chapter, and any television broadcast station licensed by a foreign government: Provided, however, That a television broadcast station licensed by a foreign government shall not be entitled to assert a claim to carriage, program exclusivity, or retransmission consent authorization pursuant to subpart D or F of this part, but may otherwise be carried if consistent with the rules on any service tier.

(c) Television translator station. A television broadcast translator station as defined in s 74.701 of this chapter.

(d) Grade A and Grade B contours. The field intensity contours defined in s 73.683(a) of this chapter.

(e) Specified zone of a television broadcast station. The area extending 56.3 air km (35 air miles) from the reference point in the community to which that station is licensed or authorized by the Commission. A list of reference points is contained in s 76.53. A television broadcast station that is authorized but not operating has a specified zone that terminates eighteen (18) months after the initial grant of its construction permit.

(f) Major television market. The specified zone of a commercial television station licensed to a community listed in s 76.51, or a combination of such specified zones where more than one community is listed.

(g) Designated community in a major television market. A community listed in s 76.51.

(h) Smaller television market. The specified zone of a commercial television station licensed to a community that is not listed in s 76.51.

(i) Significantly viewed. Viewed in other than cable television households as follows: (1) For a full or partial network station--a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station--a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See s 76.54.

Note: As used in this paragraph, "share of viewing hours" means the total hours that noncable television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of noncable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total noncable television households in the survey area.

(j) Full network station. A commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programing offered by one of the three major national television networks with which it has a primary affiliation (i.e., right of first refusal or first call).

(k) Partial network station. A commercial television broadcast station that generally carries in prime time more than 10 hours of programming per week offered by the three major national television networks, but less than the amount specified in paragraph (j) of this section.

(l) Independent station. A commercial television broadcast station that generally carries in prime time not more than 10 hours of programing per week offered by the three major national television networks.

(m) A network program is any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial.

(n) Prime time. The 5-hour period from 6 to 11 p.m., local time, except that in the central time zone the relevant period shall be between the hours of 5 and 10 p.m., and in the mountain time zone each station shall elect whether the period shall be 6 to 11 p.m. or 5 to 10 p.m.

Note: Unless the Commission is notified to the contrary, a station in the mountain time zone shall be presumed to have elected the 6 to 11 p.m. period.

(o) Cablecasting. Programming (exclusive of broadcast signals) carried on a cable television system. See paragraphs (y), (z) and (aa) (Classes II, III, and IV cable television channels) of this section.

(p) Origination cablecasting. Programing (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator.

(q) Legally qualified candidate.

(1) Any person who:

(i) Has publicly announced his or her intention to run for nomination or office;

(ii) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and

(iii) Has met the qualifications set forth in either paragraphs (q)(2), (3) or (4) of this section.

(2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in paragraph (q)(1) of this section, that person:

(i) Has qualified for a place on the ballot, or

(ii) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

Persons seeking election to the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered legally qualified candidates only in those States or territories (or the District of Columbia) in which they have met the requirements set forth in paragraphs (q) (1) and (2) of this rule; except that any such person who has met the requirements set forth in paragraphs (q) (1) and (2) in at least 10 States (or nine and the District of Columbia) shall be considered a legally qualified candidate for election in all States, territories and the District of Columbia for purposes of this Act.

(3) A person seeking nomination to any public office except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (q)(1) of this section, that person makes a substantial showing that he or she is a bona fide candidate for such nomination; except that no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

(4) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those States or territories (or the District of Columbia) in which, in addition meeting the requirements set forth in paragraph (q)(1) of this section.

(i) He or she, or proposed delegates on his or her behalf, have qualified for the primary of Presidential preference ballot in that State, territory or the District of Columbia, or

(ii) He or she has made a substantial showing of bona fide candidacy for such nomination in that State, territory or the District of Columbia; except that such person meeting the requirements set forth in paragraph (q) (1) and (4) in at least 10 States (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of the Act.

(5) The term "substantial showing" of bona fide candidacy as used in paragraph (q) (2), (3) and (4) of this section means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign headquarters (even though

the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

(r) Class I cable television channel. A signaling path provided by a cable television system to relay to subscriber terminals television broadcast programs that are received off-the-air or are obtained by microwave or by direct connection to a television broadcast station.

(s) Class II cable television channel. A signaling path provided by a cable television system to deliver to subscriber terminals television signals that are intended for reception by a television broadcast receiver without the use of an auxiliary decoding device and which signals are not involved in a broadcast transmission path.

(t) Class III cable television channel. A signaling path provided by a cable television system to deliver to subscriber terminals signals that are intended for reception by equipment other than a television broadcast receiver or by a television broadcast receiver only when used with auxiliary decoding equipment.

(u) Class IV cable television channel. A signaling path provided by a cable television system to transmit signals of any type from a subscriber terminal to another point in the cable television system.

(v) Subscriber terminal. The cable television system terminal to which a subscriber's equipment is connected. Separate terminals may be provided for delivery of signals of various classes.

Note: Terminal devices interconnected to subscriber terminals of a cable system shall comply with subpart H of part 15.

(w) System noise. That combination of undesired and fluctuating disturbances within a cable television channel that degrades the transmission of the desired signal and that is due to modulation processes or thermal or other noise-producing effects, but does not include hum and other undesired signals of discrete frequency. System noise is specified in terms of its rms voltage or its mean power level as measured in the 4 MHz bandwidth between 1.25 and 5.25 MHz above the lower channel boundary of a cable television channel.

(x) Terminal isolation. The attenuation, at any subscriber terminal, between that terminal and any other subscriber terminal in the cable television system.

(y) Visual signal level. The rms voltage produced by the visual signal during the transmission of synchronizing pulses.

(z) Affiliate. When used in relation to any person, another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

(aa) Person. An individual, partnership, association, joint stock company, trust, corporation, or governmental entity.

(bb) Significant interest. A cognizable interest for attributing interests in broadcast, cable, and newspaper properties pursuant to ss 73.3555, 73.3615, and 76.501.

(cc) Cable system operator. Any person or group of persons (1) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system; or (2) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

(dd) System community unit: Community unit. A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

(ee) Subscribers. A member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it.

(ff) Cable service. The one-way transmission to subscribers of video programming, or other programming service; and, subscriber interaction, if any, which is required for the selection of such video programming or other programming service. For the purposes of this definition, "video programming" is programming provided by, or generally considered comparable to programming provided by, a television broadcast station; and, "other programming service" is information that a cable operator makes available to all subscribers generally.

(gg) [Reserved]

(hh) Input selector switch. Any device that enables a viewer to select between cable service and off-the-air television signals. Such a device may be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

(ii) A "syndicated program" is any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States other than as network programming as defined in s 76.5(o).

(jj) Rural area. A community unit with a density of less than 19 households per route kilometer or thirty households per route mile of coaxial and/or fiber optic cable trunk and feeder line.

(kk) Technically Integrated. Having 75% or more of the video channels received from a common headend.

(ll) Cable home wiring. The internal wiring contained within the premises of a subscriber which begins at the demarcation point. Cable home wiring does not include any active elements such as amplifiers, converter or decoder boxes, or remote control units.

(mm) Demarcation point.

(1) For new and existing single unit installations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises.

(2) For new and existing multiple unit installations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, but shall not include loop through or other similar series cable wire.

(nn) Activated channels. Those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational or governmental use.

(oo) Usable activated channels. Those activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations. See part 76, subpart K.

(pp) Principal headend.

(1) The headend, in the case of a cable system with a single headend or,

(2) In the case of a cable system with more than one headend, the principal headend designated by the cable operator, except that such designation shall not undermine or evade the requirements of subpart D of this part. The designation of a principal headend shall be made by May 3, 1993, and each cable system shall place in its public file the location of its designated principal headend by June 17, 1993, as provided in s 76.302. Except for good cause, an operator may not change its choice of principal headend.



47 C.F.R. § 76.5 (1998)

**CODE OF FEDERAL REGULATIONS**  
**TITLE 47--TELECOMMUNICATION**  
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**SUBPART A--GENERAL**

§ 76.5 Definitions.

(a) Cable system or cable television system. A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

(1) A facility that services only to retransmit the television signals of one or more television broadcast stations;

(2) A facility that serves subscribers without using any public right-of-way;

(3) A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;

(4) An open video system that complies with Section 653 of the Communications Act; or

(5) Any facilities of any electric utility used solely for operating its electric utility systems.

Note to paragraph (a): The provisions of Subparts D and F of this part shall also apply to all facilities defined previously as cable systems on or before April 28, 1985, except those that serve subscribers without using any public right-of-way.

(b) Television station; television broadcast station. Any television broadcast station operating on a channel regularly assigned to its community by § 73.606 of this chapter, and any television broadcast station licensed by a foreign government: Provided, however, That a television broadcast station licensed by a foreign government shall not be entitled to assert a claim to carriage, program exclusivity, or retransmission consent authorization pursuant to subpart D or F of this part, but may otherwise be carried if consistent with the rules on any service tier.

(c) Television translator station. A television broadcast translator station as defined in § 74.701 of this chapter.

(d) Grade A and Grade B contours. The field intensity contours defined in § 73.683(a) of this chapter.

(e) Specified zone of a television broadcast station. The area extending 56.3 air km (35 air miles) from the reference point in the community to which that station is licensed or authorized by the Commission. A list of reference points is contained in § 76.53. A television broadcast station that is authorized but not operating has a specified zone that terminates eighteen (18) months after the initial grant of its construction permit.

(f) Major television market. The specified zone of a commercial television station licensed to a community listed in § 76.51, or a combination of such specified zones where more than one community is listed.

(g) Designated community in a major television market. A community listed in § 76.51.

(h) Smaller television market. The specified zone of a commercial television station licensed to a community that is not listed in § 76.51.

(i) Significantly viewed. Viewed in other than cable television households as follows: (1) For a full or partial network station--a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station--a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See § 76.54.

Note: As used in this paragraph, "share of viewing hours" means the total hours that noncable television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of noncable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total noncable television households in the survey area.

(j) Full network station. A commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the three major national television networks with which it has a primary affiliation (i.e., right of first refusal or first call).

(k) Partial network station. A commercial television broadcast station that generally carries in prime time more than 10 hours of programming per week offered by the three major national television networks, but less than the amount specified in paragraph (j) of this section.

(l) Independent station. A commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks.

(m) A network program is any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial.

(n) Prime time. The 5-hour period from 6 to 11 p.m., local time, except that in the central time zone the relevant period shall be between the hours of 5 and 10 p.m., and in the mountain time zone each station shall elect whether the period shall be 6 to 11 p.m. or 5 to 10 p.m.

Note: Unless the Commission is notified to the contrary, a station in the mountain time zone shall be presumed to have elected the 6 to 11 p.m. period.

(o) Cablecasting. Programming (exclusive of broadcast signals) carried on a cable television system. See paragraphs (y), (z) and (aa) (Classes II, III, and IV cable television channels) of this section.

(p) Origination cablecasting. Programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator.

(q) Legally qualified candidate.

(1) Any person who:

(i) Has publicly announced his or her intention to run for nomination or office;

(ii) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and

(iii) Has met the qualifications set forth in either paragraphs (q)(2), (3) or (4) of this section.

(2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in paragraph (q)(1) of this section, that person:

(i) Has qualified for a place on the ballot, or

(ii) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

Persons seeking election to the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered legally qualified candidates only in those States or territories (or the District of Columbia) in which they have met the requirements set forth in paragraphs (q) (1) and (2) of this rule; except that any such person who has met the requirements set forth in paragraphs (q) (1) and (2) in at least 10 States (or nine and the District of Columbia) shall be considered a legally qualified candidate for election in all States, territories and the District of Columbia for purposes of this Act.

(3) A person seeking nomination to any public office except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (q)(1) of this section, that person makes a substantial showing that he or she is a bona fide candidate for such nomination; except that no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

(4) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those States or territories (or the District of Columbia) in which, in addition meeting the requirements set forth in paragraph (q)(1) of this section.

(i) He or she, or proposed delegates on his or her behalf, have qualified for the primary of Presidential preference ballot in that State, territory or the District of Columbia, or

(ii) He or she has made a substantial showing of bona fide candidacy for such nomination in that State, territory of the District of Columbia; except that such person meeting the requirements set forth in paragraph (q) (1) and (4) in at least 10 States (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of the Act.

(5) The term "substantial showing" of bona fide candidacy as used in paragraph (q) (2), (3) and (4) of this section means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities

commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

(r) Class I cable television channel. A signaling path provided by a cable television system to relay to subscriber terminals television broadcast programs that are received off-the-air or are obtained by microwave or by direct connection to a television broadcast station.

(s) Class II cable television channel. A signaling path provided by a cable television system to deliver to subscriber terminals television signals that are intended for reception by a television broadcast receiver without the use of an auxiliary decoding device and which signals are not involved in a broadcast transmission path.

(t) Class III cable television channel. A signaling path provided by a cable television system to deliver to subscriber terminals signals that are intended for reception by equipment other than a television broadcast receiver or by a television broadcast receiver only when used with auxiliary decoding equipment.

(u) Class IV cable television channel. A signaling path provided by a cable television system to transmit signals of any type from a subscriber terminal to another point in the cable television system.

(v) Subscriber terminal. The cable television system terminal to which a subscriber's equipment is connected. Separate terminals may be provided for delivery of signals of various classes.

Note: Terminal devices interconnected to subscriber terminals of a cable system shall comply with subpart H of part 15.

(w) System noise. That combination of undesired and fluctuating disturbances within a cable television channel that degrades the transmission of the desired signal and that is due to modulation processes or thermal or other noise-producing effects, but does not include hum and other undesired signals of discrete frequency. System noise is specified in terms of its rms voltage or its mean power level as measured in the 4 MHz bandwidth between 1.25 and 5.25 MHz above the lower channel boundary of a cable television channel.

(x) Terminal isolation. The attenuation, at any subscriber terminal, between that terminal and any other subscriber terminal in the cable television system.

(y) Visual signal level. The rms voltage produced by the visual signal during the transmission of synchronizing pulses.

(z) Affiliate. When used in relation to any person, another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

(aa) Person. An individual, partnership, association, joint stock company, trust, corporation, or governmental entity.

(bb) Significant interest. A cognizable interest for attributing interests in broadcast, cable, and newspaper properties pursuant to §§ 73.3555, 73.3615, and 76.501.

(cc) Cable system operator. Any person or group of persons (1) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system; or (2) who otherwise

controls or is responsible for, through any arrangement, the management and operation of such a cable system.

(dd) System community unit: Community unit. A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

(ee) Subscribers. A member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it.

(ff) Cable service. The one-way transmission to subscribers of video programming, or other programming service; and, subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. For the purposes of this definition, "video programming" is programming provided by, or generally considered comparable to programming provided by, a television broadcast station; and, "other programming service" is information that a cable operator makes available to all subscribers generally.

(gg) [Reserved]

(hh) Input selector switch. Any device that enables a viewer to select between cable service and off-the-air television signals. Such a device may be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

(ii) A "syndicated program" is any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States other than as network programming as defined in § 76.5(o).

(jj) Rural area. A community unit with a density of less than 19 households per route kilometer or thirty households per route mile of coaxial and/or fiber optic cable trunk and feeder line.

(kk) Technically Integrated. Having 75% or more of the video channels received from a common headend.

(ll) Cable home wiring. The internal wiring contained within the premises of a subscriber which begins at the demarcation point. Cable home wiring includes passive splitters on the subscriber's side of the demarcation point, but does not include any active elements such as amplifiers, converter or decoder boxes, or remote control units.

(mm) Demarcation point.

(1) For new and existing single unit installations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises.

(2) For new and existing multiple dwelling unit installations with non-loop-through wiring configurations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber's dwelling unit.

(3) For new and existing multiple dwelling unit installations with loop-through wiring configurations, the demarcation points shall be at (or about) twelve inches outside of where the cable wire enters or exits the first and last individual dwelling units on the loop, or, where the wire is physically inaccessible at such point(s), the closest practicable point thereto that does not require access to an individual subscriber's dwelling unit.

(4) As used in this paragraph (mm)(3), the term "physically inaccessible" describes a location that:

- (i) Would require significant modification of, or significant damage to, preexisting structural elements, and
- (ii) Would add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring.

Note to paragraph (mm)(4): For example, wiring embedded in brick, metal conduit or cinder blocks with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not.

(nn) Activated channels. Those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational or governmental use.

(oo) Usable activated channels. Those activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations. See part 76, subpart K.

(pp) Principal headend.

(1) The headend, in the case of a cable system with a single headend or,

(2) In the case of a cable system with more than one headend, the principal headend designated by the cable operator, except that such designation shall not undermine or evade the requirements of subpart D of this part. The designation of a principal headend shall be made by May 3, 1993, and each cable system shall place in its public file the location of its designated principal headend by June 17, 1993, as provided in § 76.302. Except for good cause, an operator may not change its choice of principal headend.

(qq) Emergency Alert System (EAS). The EAS is composed of broadcast networks; cable networks and program suppliers; AM, FM and TV broadcast stations; Low Power TV (LPTV) stations; cable systems and wireless cable systems; and other entities and industries operating on an organized basis during emergencies at the National, State, or local levels.

47 C.F.R. § 76.5 (2004)

**CODE OF FEDERAL REGULATIONS  
TITLE 47--TELECOMMUNICATION  
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION  
SUBCHAPTER C--BROADCAST RADIO SERVICES  
PART 76--MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE  
SUBPART A--GENERAL**

Current through October 1, 2004, 69 FR 58858

§ 76.5 Definitions.

(a) Cable system or cable television system. A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

(1) A facility that services only to retransmit the television signals of one or more television broadcast stations;

(2) A facility that serves subscribers without using any public right-of-way;

(3) A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;

(4) An open video system that complies with Section 653 of the Communications Act; or

(5) Any facilities of any electric utility used solely for operating its electric utility systems.

Note to paragraph (a): The provisions of Subparts D and F of this part shall also apply to all facilities defined previously as cable systems on or before April 28, 1985, except those that serve subscribers without using any public right-of-way.

(b) Television station; television broadcast station. Any television broadcast station operating on a channel regularly assigned to its community by § 73.606 or § 73.622 of this chapter, and any television broadcast station licensed by a foreign government: Provided, however, That a television broadcast station licensed by a foreign government shall not be entitled to assert a claim to carriage, program exclusivity, or retransmission consent authorization pursuant to subpart D or F of this part, but may otherwise be carried if consistent with the rules on any service tier. Further provided that a television broadcast station operating on channels regularly assigned to its community by both §§ 73.606 and 73.622 of this chapter may assert a claim for carriage pursuant to subpart D of this part only for a channel assigned pursuant to § 73.606.

(c) Television translator station. A television broadcast translator station as defined in § 74.701 of this chapter.

(d) Grade A and Grade B contours. The field intensity contours defined in § 73.683(a) of this chapter.

(e) Specified zone of a television broadcast station. The area extending 56.3 air km (35 air miles) from the reference point in the community to which that station is licensed or authorized by the Commission. A list of reference points is contained in § 76.53. A television broadcast station that is authorized but not operating has a specified zone that terminates eighteen (18) months after the initial grant of its construction permit.

(f) Major television market. The specified zone of a commercial television station licensed to a community listed in § 76.51, or a combination of such specified zones where more than one community is listed.

(g) Designated community in a major television market. A community listed in § 76.51.

(h) Smaller television market. The specified zone of a commercial television station licensed to a community that is not listed in § 76.51.

(i) Significantly viewed. Viewed in other than cable television households as follows: (1) For a full or partial network station--a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station--a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See § 76.54.

Note: As used in this paragraph, "share of viewing hours" means the total hours that noncable television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of noncable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total noncable television households in the survey area.

(j) Full network station. A commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the three major national television networks with which it has a primary affiliation (i.e., right of first refusal or first call).

(k) Partial network station. A commercial television broadcast station that generally carries in prime time more than 10 hours of programming per week offered by the three major national television networks, but less than the amount specified in paragraph (j) of this section.

(l) Independent station. A commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks.

(m) A network program is any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial.

(n) Prime time. The 5-hour period from 6 to 11 p.m., local time, except that in the central time zone the relevant period shall be between the hours of 5 and 10 p.m., and in the mountain time zone each station shall elect whether the period shall be 6 to 11 p.m. or 5 to 10 p.m.

Note: Unless the Commission is notified to the contrary, a station in the mountain time zone shall be presumed to have elected the 6 to 11 p.m. period.

(o) Cablecasting. Programming (exclusive of broadcast signals) carried on a cable television system. See paragraphs (y), (z) and (aa) (Classes II, III, and IV cable television channels) of this section.



(p) Origination cablecasting. Programing (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator.

(q) Legally qualified candidate.

(1) Any person who:

(i) Has publicly announced his or her intention to run for nomination or office;

(ii) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and

(iii) Has met the qualifications set forth in either paragraphs (q)(2), (3) or (4) of this section.

(2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in paragraph (q)(1) of this section, that person:

(i) Has qualified for a place on the ballot, or

(ii) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

Persons seeking election to the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered legally qualified candidates only in those States or territories (or the District of Columbia) in which they have met the requirements set forth in paragraphs (q)(1) and (2) of this rule; except that any such person who has met the requirements set forth in paragraphs (q)(1) and (2) in at least 10 States (or nine and the District of Columbia) shall be considered a legally qualified candidate for election in all States, territories and the District of Columbia for purposes of this Act.

(3) A person seeking nomination to any public office except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (q)(1) of this section, that person makes a substantial showing that he or she is a bona fide candidate for such nomination; except that no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

(4) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those States or territories (or the District of Columbia) in which, in addition meeting the requirements set forth in paragraph (q)(1) of this section.

(i) He or she, or proposed delegates on his or her behalf, have qualified for the primary of Presidential preference ballot in that State, territory or the District of Columbia, or

(ii) He or she has made a substantial showing of bona fide candidacy for such nomination in that State, territory or the District of Columbia; except that such person meeting the requirements set forth in paragraph (q)(1) and (4) in at

least 10 States (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of the Act.

(5) The term "substantial showing" of bona fide candidacy as used in paragraph (q)(2), (3) and (4) of this section means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

(r) Class I cable television channel. A signaling path provided by a cable television system to relay to subscriber terminals television broadcast programs that are received off-the-air or are obtained by microwave or by direct connection to a television broadcast station.

(s) Class II cable television channel. A signaling path provided by a cable television system to deliver to subscriber terminals television signals that are intended for reception by a television broadcast receiver without the use of an auxiliary decoding device and which signals are not involved in a broadcast transmission path.

(t) Class III cable television channel. A signaling path provided by a cable television system to deliver to subscriber terminals signals that are intended for reception by equipment other than a television broadcast receiver or by a television broadcast receiver only when used with auxiliary decoding equipment.

(u) Class IV cable television channel. A signaling path provided by a cable television system to transmit signals of any type from a subscriber terminal to another point in the cable television system.

<Text of subsection (v) effective until Oct. 28, 2004.>

(v) Subscriber terminal. The cable television system terminal to which a subscriber's equipment is connected. Separate terminals may be provided for delivery of signals of various classes.

Note: Terminal devices interconnected to subscriber terminals of a cable system shall comply with subpart H of part 15.

<Text of subsection (v) effective Oct. 28, 2004.>

(v) Subscriber terminal. The cable television system terminal to which a subscriber's equipment is connected. Separate terminals may be provided for delivery of signals of various classes. Terminal devices interconnected to subscriber terminals of a cable system must comply with the provisions of part 15 of this Chapter for TV interface devices.

(w) System noise. That combination of undesired and fluctuating disturbances within a cable television channel that degrades the transmission of the desired signal and that is due to modulation processes or thermal or other noise-producing effects, but does not include hum and other undesired signals of discrete frequency. System noise is specified in terms of its rms voltage or its mean power level as measured in the 4 MHz bandwidth between 1.25 and 5.25 MHz above the lower channel boundary of a cable television channel.

(x) Terminal isolation. The attenuation, at any subscriber terminal, between that terminal and any other subscriber terminal in the cable television system.

(y) Visual signal level. The rms voltage produced by the visual signal during the transmission of synchronizing pulses.

(z) Affiliate. When used in relation to any person, another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

(aa) Person. An individual, partnership, association, joint stock company, trust, corporation, or governmental entity.

(bb) Significant interest. A cognizable interest for attributing interests in broadcast, cable, and newspaper properties pursuant to §§ 73.3555, 73.3615, and 76.501.

(cc) Cable system operator. Any person or group of persons (1) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system; or (2) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

(dd) System community unit: Community unit. A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

(ee) Subscribers. A member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it.

(ff) Cable service. The one-way transmission to subscribers of video programming, or other programming service; and, subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. For the purposes of this definition, "video programming" is programming provided by, or generally considered comparable to programming provided by, a television broadcast station; and, "other programming service" is information that a cable operator makes available to all subscribers generally.

(gg) [Reserved]

(hh) Input selector switch. Any device that enables a viewer to select between cable service and off-the-air television signals. Such a device may be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

(ii) A syndicated program is any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States other than as network programming as defined in § 76.5(m).

(jj) Rural area. A community unit with a density of less than 19 households per route kilometer or thirty households per route mile of coaxial and/or fiber optic cable trunk and feeder line.

(kk) Technically Integrated. Having 75% or more of the video channels received from a common headend.

(ll) Cable home wiring. The internal wiring contained within the premises of a subscriber which begins at the demarcation point. Cable home wiring includes passive splitters on the subscriber's side of the demarcation point, but does not include any active elements such as amplifiers, converter or decoder boxes, or remote control units.

(mm) Demarcation point.

(1) For new and existing single unit installations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises.

(2) For new and existing multiple dwelling unit installations with non-loop-through wiring configurations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber's dwelling unit.

(3) For new and existing multiple dwelling unit installations with loop-through wiring configurations, the demarcation points shall be at (or about) twelve inches outside of where the cable wire enters or exits the first and last individual dwelling units on the loop, or, where the wire is physically inaccessible at such point(s), the closest practicable point thereto that does not require access to an individual subscriber's dwelling unit.

(4) As used in this paragraph (mm)(3), the term "physically inaccessible" describes a location that:

(i) Would require significant modification of, or significant damage to, preexisting structural elements, and

(ii) Would add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring.

Note to § 76.5 Paragraph (mm)(4): For example, wiring embedded in brick, metal conduit, cinder blocks, or sheet rock with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not.

(nn) Activated channels. Those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational or governmental use.

(oo) Usable activated channels. Those activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations. See part 76, subpart K.

(pp) Principal headend.

(1) The headend, in the case of a cable system with a single headend or,

(2) In the case of a cable system with more than one headend, the principal headend designated by the cable operator, except that such designation shall not undermine or evade the requirements of subpart D of this part. The designation of a principal headend shall be made by May 3, 1993, and each cable system shall place in its public file the location of its designated principal headend by June 17, 1993, as provided in § 76.1708. Except for good cause, an operator may not change its choice of principal headend.

(qq) Emergency Alert System (EAS). The EAS is composed of broadcast networks; cable networks and program suppliers; AM, FM and TV broadcast stations; Low Power TV (LPTV) stations; cable systems and wireless cable systems; and other entities and industries operating on an organized basis during emergencies at the National, State, or local levels.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.

Certificate Of Service

I, Shirley E. Farmer, hereby certify that the foregoing typewritten "Brief for Respondents" was served this 14th day of April, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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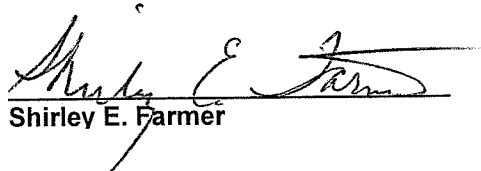
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